

must be approved.<sup>42</sup> AT&T and TCG have gone much further, clearly and simply stating the merger's substantial pro-competitive benefits, most notably its positioning of the combined firm as a more effective local entrant than either of the merging parties. The applications should be approved forthwith.

#### **IV. OTHER OBJECTIONS TO THE PROPOSED MERGER ARE BOTH MERITLESS AND BEYOND THE SCOPE OF THIS PROCEEDING.**

Finally, some commenters raise other non-merger-related allegations regarding discrimination and slamming that are both erroneous and patently irrelevant to the transfer of control applications. First, Inner City Press (at 3) contends that TCG currently bypasses less affluent residential customers and thereby "blatantly excludes" lower income communities. ICP misunderstands the competitive and regulatory context in which TCG emerged as an alternative carrier. TCG does not discriminate against any class of customers. It has not been economical,

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<sup>42</sup> See SBC/Pacific Merger Order ¶ 2 ("A demonstration that benefits will arise from the transaction is not, however, a prerequisite to our approval, provided that no foreseeable adverse consequences will result from the transfer"); Memorandum Op. and Order, In re Applications of Pacificorp Holdings and Century Telephone Enters. for Consent to Transfer Control of Pacific Telecom, DA 97-2225 ¶ 3 (rel. Oct. 17, 1997) ("Pacificorp/Century Telephone Merger Order") (there is "no evidence that the proposed merger between Century and PTI will adversely affect competition in any relevant market. Balanced against this, we find that Applicants have not established the existence of substantial pro-competitive efficiency benefits to consumers. Applicants have, however, submitted evidence, which remains unchallenged, indicating that the merger may produce additional public interest benefits for some consumers, especially those in rural communities, through plant upgrades and investment in enhanced telecommunications services. This evidence is entitled to limited weight since Applicants have made no commitments to make those upgrades. When taken together with the limited efficiency benefits, however, this evidence is sufficient for Applicants to meet their burden of proof given the absence of any evidence that the proposed merger may inhibit or delay the development of competition").

however, for it to build facilities to every customer.<sup>43</sup> Unlike incumbents, TCG has never been granted a monopoly franchise, has never been assured of an opportunity to recover all of its costs and a reasonable profit through rate of return regulation, and has never had the luxury of charging supracompetitive rates to any customers. Indeed, a central theme of the Telecommunications Act of 1996 is that it is simply not possible for a new entrant to duplicate the extensive network infrastructure that its monopoly competitors have amassed under rate of return protections. For this reason, the Act offers resale and unbundled elements as alternatives to facilities construction because, as both the Commission and the Eighth Circuit have observed, "Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry."<sup>44</sup>

The three pro se commenters and Inner City Press (at 14) also allege that AT&T has a practice of "slamming" customers. These allegations are baseless. AT&T is an acknowledged

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<sup>43</sup> It should be noted that the New York Public Service Commission ("NYPSC") has never required that competing local carriers serve particular neighborhoods or income groups. The NYPSC has authorized lower reciprocal compensation costs for "full service providers" to "encourage local exchange carriers to provide the full range of residence, business, and Lifeline services, and to do so through their own facilities," but has stated that new entrants "need not, however, replicate the incumbent's territory, service offerings, or customer mix." See Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Case No. 94-C-0095, Opinion No. 96-13 at 32 (issued May 22, 1996).

<sup>44</sup> Iowa Utils. Bd. v. FCC, 120 F.3d 753, 816 (8th Cir. 1997), cert. granted 118 S. Ct. 879 (Jan. 26, 1998); Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, FCC 97-346 ¶ 81 (released October 1, 1997) ("our experience with industry investment patterns by other CLECs and the data supplied by AT&T, lead us to conclude that the COA build-out requirements are prohibitively expensive and would clearly prevent COA holders from competing in a fair and balanced environment. We also conclude that the economic impact of the build-out requirements are great enough to have the effect of prohibiting entities subject to these requirements from providing competitive local exchange service in Texas").

industry leader in confronting slamming and taking measures to prevent it, and, indeed, recently announced “three tough new measures,” AT&T Anti-Slamming News Release at 1, that far exceed current industry practices.

In any event, the Commission has repeatedly held that it “will not consider arguments in [transfer of control] proceeding[s] that are better addressed in other Commission proceedings, or other legal fora[.]” and that its “complaint processes are available to those who believe that [the merged company] has violated . . . any applicable provision of the Communications Act.” AT&T/McCaw Merger Order ¶ 123. Insofar as any commenter has concerns about discrimination or slamming, those concern can and should be addressed in other, more germane proceedings.<sup>45</sup>

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<sup>45</sup> The Commission generally only delays its action on transfer of control applications due to alleged licensee misconduct when the transfer would “permit a licensee to sell out from under a potential disqualification[.]” Memorandum Op. & Order, In re Cellular System One of Tulsa, FCC 85-322, 102 F.C.C.2d 86 ¶ 2 (1985). TCG does not face any potential disqualification and AT&T, the transferee, will be responsible for ensuring that the future use of TCG’s facilities complies with the Communications Act’s requirements.

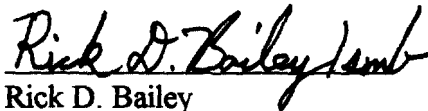
## CONCLUSION

Given the obvious -- and undisputed -- benefits that the transfer of control of TCG's licenses to AT&T promises for consumers and competition, and the complete absence of competitive harms, AT&T and TCG respectfully request that the Commission approve the applications without delay.

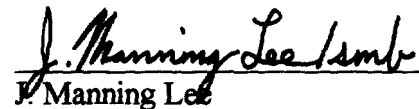
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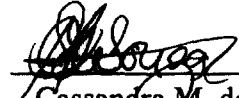


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## **CERTIFICATE OF SERVICE**

I, Cassandra M. de Souza, do hereby certify that I caused a copy of the foregoing Reply Comments of AT&T Corp. and Teleport Communications Group to be served this 27th day of April, 1998, by First Class mail on all parties on the attached service list.

  
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